Supreme Court, U.S.
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OFFICE

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH CLAVETTE,

PETITIONER

v.

STATE OF MAINE, DEFENSE & VETERANS SERVICES,

RESPONDENT

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the state administrative review and rejection of the legal and factual findings of the Veterans' Administration violate federal and constitutional law?

2. Does a state administrative body have jurisdiction and authority to reject findings of the Veterans' Administration and does the rejection violate the Preemption Doctrine?

3. Did the Maine Legislature intend the offset provision contained in 37-A M.R.S.A. § 938 (now 37-B M.R.S.A. § 186(1)(F)) to be applied retroactively against established awards of benefits?

4. If so, does enforcement and retroactive application of the offset provision violate the Due Process Clause of the United States Constitution?

5. Does Maine's statutory recognition of offsets as "substantive rights" and denial of retroactive application of all offset statutes to existing benefit awards, except for

cases involving veterans' benefits, violate the Equal Protection Clause of the Fourteenth Amendment?

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CITATION OF OPINIONS

Clavette v. State of Maine (National Guard) and Self-Insured, WCB: 78-048017 (Decree dated September 29, 1999 and Findings of Fact and Conclusions of Law dated December 14, 1999).

Clavette v. State of Maine, Defenses & Veterans Services, Docket No. WCB-00-08 (Order Denying Petition for Appellate Review dated September 21, 2000).

STATEMENT OF JURISDICTION

The Maine Workers' Compensation Board (the Board) issued a decree in this matter on September 29, 1999. The Workers' Compensation Board issued an order denying further Findings of Fact and Conclusions of Law on December 14, 1999.

The State of Maine Supreme Judicial Court sitting as the Law Court entered an Order Denying Petition for Appellate Review on September 21, 2000.

The jurisdiction of this Court to review these orders is invoked under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The employee, Joseph Clavette, is a Vietnam veteran. After the War, he was awarded a ten percent (10%) service-connected disability for psycho-physiological reaction. Later, Mr. Clavette joined the Maine National Guard. He continued to receive his veterans' disability benefits. On August 23, 1978, Mr. Clavette injured his back while on maneuvers with the Maine National Guard. Mr. Clavette petitioned the Board for workers' compensation benefits. The Board granted his Petition for Award by Decree on January 30, 1981, awarding him retroactive and prospective compensation benefits for total incapacity. See Appendix, page A1. Mr. Clavette continued to receive benefits for total incapacity until August 26, 1998.

At the time of Mr. Clavette's injury and the Board's Decree, the Military Personnel Statute, 37-A M.R.S.A. § 938, did not permit a setoff of any veterans' benefits from

workers' compensation benefits that were paid to a National Guardsman. An offset was only allowed when a Guardsman returned to active federal pay status while on an encampment or on maneuvers. In fact, the original Board Decree of January 30, 1981 specifically stated that the State of Maine could offset benefits for any periods of time when Mr. Clavette was on federal pay status while on active duty. Mr. Clavette has not been on federal pay status or on active duty since his injury.

In 1981, the Maine Legislature amended 37-A M.R.S.A. § 938 in pertinent part by adding the following sentence: "For purposes of Title 39, Section 62, federal pay and benefits received by the member as a result of any such wound, injury or disease shall be considered to be derived from the employer and will constitute a set-off to compensation derived as a result of this section."

This amendment became effective on July 13, 1982. In 1983, the Legislature recodified the military laws and

this provision became 37-B M.R.S.A. § 186(3). Following further amendment, this provision is now found at 37-B M.R.S.A. § 186(1)(F). In its later form, the provision reads in pertinent part, as follows:

> For the purpose of former Title 39, section 62, all federal benefits received by the member as a result of an injury, disability or disease are considered to be derived from the employer and constitute a setoff to compensation awarded as a result of this section. A dollar-for-dollar setoff is authorized for all federal benefits to include. . . Veterans' Administration disability payments. . ..

37-B M.R.S.A. § 186(1)(F).

In passing the amendment and recodification, the Legislature expressed no intention that the amendment be applied retroactively.

By letter dated September 23, 1986, the Maine Department of Defense sought to unilaterally reduce Mr. Clavette's workers' compensation by an amount he received per week for Veterans' Administration benefits. Mr. Clavette objected to this unilateral reduction and asked the Board for a conference on this issue because the amendment had no retroactive application to his date of injury. Following the conference, the Maine Department of Defense withdrew its attempt to enforce the setoff. On June 24, 1992, the Maine Department of Administration, again by letter, sought to enforce this setoff against Mr. Clavette. On April 18, 1994, they filed a Petition for Set-off seeking an offset against compensation paid and being paid to the employee in V.A. benefits both prospectively and retroactively against his workers' compensation. After a hearing, the Board issued a decree granting the employer's Petition for Set-off on October 31, 1996.

The Board found there was no specific savings

clause expressly exempting the amendment to Section 938 from its operation. It noted the language of the amendment was general and made no reference to causes of actions which had already accrued. Since there was no apparent Legislative intention to apply the statute retroactively, the Board expressly found that the provision was not intended to be retroactive. However, the Board found that applying the statute from the date of the decree forward would not constitute a retrcactive application because the statute effected only a procedural, rather than a substantive, change. On that reasoning, the Hearing Officer granted the employer's Petition for Set-off. Mr. Clavette petitioned the Maine Supreme Judicial Court sitting as the Law Court for appellate review of that decision. The Law Court denied that Petition on April 7, 1998.

By this time, the Veterans' Administration rated Mr. Clavette's disability for his back injury at sixty percent

(60%) due to sciatic neuropathy, pain, muscle spasm and other neurological findings. Separate and apart from his work-related back injury, the Veterans' Administration had also increased his Vietnam-era psychological injury from ten percent (10%) to a seventy percent (70%) disability rating. Thus, at the time the offset went into effect, the Veterans' Administration rated Mr. Clavette at a sixty percent (60%) disability as a result of his back injury and a seventy percent (70%) disability as a result of his Vietnam-era psychological injury.

The VA Hearing Officer explained the basis for the increase in Mr. Clavette's War-related psychological disability as follows:

> An evaluation of 70% is assigned whenever there is evidence of severe inability to establish and maintain effective or favorable relationships with people. The psycho-neurotic symptoms are of such severity and

> persistence that there is severe impairment in the ability to obtain or retain employment. . .. Examination shows severe condition with global assessment functioning of 31 to 40. [VA Ratings Decision, Oct. 13, 1995.]

The Veterans' Administration did not connect in any way this increase in Mr. Clavette's psychological disability to his work-related back injury.

Later, the Veterans' Administration re-evaluated Mr. Clavette's psychological injury. They found the following:

> Vietnam examination dated 08-21-96 shows veteran's mood is very depressed, his hands shake, and his palms sweat. Has difficulty with his associative processes. His cognitive functions would be described as impaired with decreased concentration. His

> affect is blunted and he had not delusions or hallucinations, but he made poor eye contact. He denies current suicidal, paranoid, or homicidal ideation. He has limited insight with an average IQ and fair judgment. He reports poor sleep and crying spells. His speech is quiet but rambling. He has a severely impaired industrial and social capacity. His current GAF is about 40. [VA Ratings Decision, Sept. 12, 1996.]

Again, the Veterans' Administration did not attribute any part of his psychological disability to Mr. Clavette's back injury. Combining both disabilities, the Veterans' Administration paid Mr. Clavette a one-hundred percent (100%) disability in the amount of $1,964.00 per month. Only $726.00 per month was attributable to Mr. Clavette's work-related back injury.

For ten years, the Maine National Guard claimed

that Mr. Clavette's psychological injuries were not due to his work injury but to his pre-existing psychological disorder. However, when the Board allowed them an offset for his Veterans' Administration benefits, the Maine National Guard claimed the opposite: Mr. Clavette's psychological problems were all due to his work injury. Unilaterally and with no additional evidence, the Maine National Guard now took a total offset of $1,964.00 per month based on all of his Veterans' Administration disability benefits. They stopped paying Mr. Clavette any workers' compensation benefits on August 26, 1998. For the first time in twenty years, Mr. Clavette's workers' compensation benefits were terminated because of the inclusion of his pre-existing, Vietnam-era psychological disability rating which had nothing to do with his back injury.

On January 27, 1999, Mr. Clavette filed a Petition for Order of Payment alleging the Maine National Guard

was barred from taking an offset for Veterans' Administration benefits he was receiving for his Vietnam-era psychological injury. Mr. Clavette relied on the specific findings of the Veterans' Administration as to the cause of his psychological disability and the opinions of his psychiatrist, Dr. H. Randall Grumpelt. In support of its claim, the Maine National Guard sought to admit transcripts of Dr. Grumpelt's depositions taken in 1986, 1991 and 1992 when the State was alleging Mr. Clavette's psychological condition was not related to his back injury. Mr. Clavette objected to the admission of this testimony as irrelevant to the issue of whether, in August 1998, Mr. Clavette's psychological problems were related to his back injury. They had limited probative or relevant evidentiary value. The Board allowed them into evidence for the limited purpose of providing an historical perspective on the issue.

The Board denied Mr. Clavette's Petition for Order

of Payment and allowed the Maine National Guard to continue to offset the portion of Mr. Clavette's VA disability benefits attributable to his Vietnam-era psychological injury. The Hearing Officer relied extensively on Dr. Grumpelt's prior deposition testimony taken from 1986 to 1992, none of which was probative and relevant to the cause of Mr. Clavette's psychological problems in August 1998.

Mr. Clavette petitioned for appellate review before the Maine Supreme Judicial Court. On September 27, 2000, Mr. Clavette received the Maine Supreme Judicial Court's Order of September 21, 2000 denying his Petition for Appellate Review. Mr. Clavette now files this Petition for a Writ of *Certiorari* to address state violations of his federal and constitutional rights.

ARGUMENT

The Board lacked the authority to review and reject the Veterans' Administration's factual finding and legal

conclusion that Mr. Clavette's psychological injuries were due to his Vietnam-era psychological injury. Furthermore, the Board lacked jurisdiction to judicially review the findings and conclusions of the Veterans' Administration. The provisions of 38 U.S.C.A. §511 grant the Secretary of the Veterans' Administration the sole authority to "decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." A decision of the Secretary of the Veterans' Administration as to any such question is "final and conclusive" and may not be reviewed by any other official or by any court. By exercising jurisdiction, rejecting findings of the Veterans' Administration and failing to recognize the federal government's preemption of this area of the law, the Board exceeded its authority.

A second issue is whether former 37-A M.R.S.A. §938, now 37-B M.R.S.A. §186(1)(F), can be applied

retroactively to prior, established work injuries. This has never been decided by the Maine Supreme Judicial Court. The Hearing Officer originally and expressly found that the statute was not intended to be applied retroactively; however, the prior Hearing Officer found that the setoff was a procedural rather than substantive change and thus could be applied to Mr. Clavette prospectively even though his injury date was prior to the effective date of the Statute. Those two findings are inconsistent, since a finding that the Statute was not intended to be retroactive should preclude its application to injuries which occurred prior to the Statute's enactment. The original judgment awarding benefits specifically limited any offsets to veterans who were on active pay status. Mr. Clavette has a property interest in compensation benefits vested at the time of his work injury. The retroactive application of the offset statute is in violation of the Due Process Clause of the Fourteenth Amendment.

I. THE MAINE WORKERS' COMPENSATION BOARD'S REJECTION OF A FINAL VETERANS' ADMINISTRATION FINDING ON THE CAUSE OF MR. CLAVETTE'S PSYCHOLOGICAL DISABILITY WAS A VIOLATION OF FEDERAL LAW AND AN UNCONSTITUTIONAL EXERCISE OF JURISDICTION IN AN AREA OF LAW PREEMPTED BY FEDERAL STATUTE.

The provisions of 38 U.S.C.A. §511(a) vests authority in the Veterans' Administration to decide all questions of law and fact necessary to a decision awarding benefits to veterans. The decision of the Veterans' Administration as to any such question "shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C.A. §511(a). Section 511(a) bars judicial review of any such questions of law and fact by any court, not just federal courts and

regulatory agencies. Aside from limited exceptions, none of which apply here, the granting of such pervasive power to the Secretary of the Veterans' Administration is evidence of Congress' intent to preempt the exercise of state power in the interpretation and award of veterans' benefits. The findings and conclusions of the Veterans' Administration on benefit issues are final and unreviewable.

The Board lacked the authority to reject the Veterans' Administration's finding that Mr. Clavette's seventy percent (70%) psychological disability was the result of his Vietnam-era service. The Veterans' Administration's finding on this issue was final, conclusive and unreviewable by the Board or any Maine court. Congress has preempted the entire field of regulation in this area of federal law. Congress specifically vested in the Veterans' Administration the sole right to make factual and legal findings on the cause of a veteran's disability.

Rejecting the findings of the Veterans' Administration, the Board violated the Preemption Doctrine and provisions of Article VI, Clause 2 of the United States Constitution which says that judges in every state shall be bound by the laws of the United States.

The Board's unlawful rejection of this Veterans' Administration's factual finding constitutes state action which deprived him of his property right to workers' compensation benefits. The Board exercised this state action in an arbitrary and capricious manner since its decision was based on medical evidence generated five to ten years earlier which was clearly irrelevant and immaterial to the specific issue the Board was addressing. Such action violated Mr. Clavette's constitutional right to due process of law under the Fifth Amendment to the United States Constitution.

The actions of the Board were not taken to preserve any overriding state interest. In fact, the state interest the

Maine Workers' Compensation Board sought to enforce by means of its overreaching decision was self-serving in that it resulted in the elimination of the State's responsibility to pay Mr. Clavette workers' compensation benefits to which he was legitimately and lawfully entitled. The actions of the Board violate federal law, the Supremacy Clause of the United States Constitution and the Preemption Doctrine.

II. THE RETROACTIVITY OF THE SETOFF PROVISION VIOLATES THE DUE PROCESS CLAUSE SINCE IT EFFECTS A SUBSTANTIVE CHANGE IN THE RIGHTS OF VETERANS INJURED PRIOR TO ITS EFFECTIVE DATE.

It is axiomatic that statutory retroactivity is not favored. Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994); Bowen v. Georgetown University Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 1493, 1496-97 (1988); Coates v. Maine Employment Security Commission, 406 A.2d 94, 97 (Me.

1979). When retroactive application affects the amount a party may receive or the monetary liability of a party or decreases the responsibility of another party, retroactive statutory application has been deemed impermissible. Winfree v. Northern Pacific Railroad Co., 227 U.S. 296, 301, 33 S.Ct. 273, 274, 57 L.Ed. 518 (1913).

The amount of liability and the responsibility of parties for payment and entitlement to monetary relief is a substantive right, not a procedural issue. Landgraf v. U.S.I. Film Products, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). Retroactive application of a statute which affects monetary relief potentially available to a client who would have been entitled to a certain amount of back pay under prior law has been disallowed. Id. at 1491.

In Maine, a statutory amendment, retroactively applied, which enlarges or constricts the substance of rights of either party is not allowed. Sutherland v. Pepsi-Cola Bottling Co., 402 A.2d 50, 52 (Me. 1979). The Maine

Supreme Judicial Court has defined substantive legislation as that which "radically affects rights and obligations of the parties." Schlear v. Fiber Materials, Inc., 574 A.2d 876, 878 (Me. 1990); Batchelder v. Tweedie, 294 A.2d 443, 445 (Me. 1972); Langley v. Home Indemnity Co., 272 A.2d 740, 746 (Me. 1971). In Langley, *supra*, the Maine Supreme Judicial Court quoted the United States Supreme Court's holding in Winfree v. Northern Pacific Railroad Co. as follows:

> *It is the operation of the statute which determines its character....it is a statute which permits recovery in cases where recovery could not be had before, and takes from the defenses which formerly were available, defenses which in this instance existed at the time when the contract of services entered into and at the time when the accident occurred.* Such a statute. . . should not construed as retrospective. It

> introduced a new policy and quite radically changed the existing law.

Winfree, 227 U.S. 296 at 331, 33 S.Ct. 273 (emphasis added). Thus, if a statute radically affects rights and obligations which the parties had prior to its effective date, entitlement which had been deemed appropriate and fully concluded on the date of the amendment, retroactivity is generally not allowed.

A setoff is a reduction of one litigant's claim by an opposing claim; it is a reduction in the amount one party may receive and in the opposing party's obligation to pay. Wholly statutory, the legal setoff here is clearly a detriment to the injured worker since it lowers his level of benefits and is a legal boon to the employer since it lowers the amount of benefits it has to pay. In essence, the legal setoff claimed here provided the employer with a cause of action or defense which did not exist when the employee's injury occurred and when his entitlement to a certain level

of benefits was legally established by decree or judgment.

The setoff provision is not a mere procedural issue. The statutory creation of a setoff is a substantive change in the law, one which clearly had adverse effects for injured national guardsmen at the time of its passage. It clearly altered the responsibility of the State by decreasing the amount of benefits it was required to pay. The amount of liability, the responsibility of parties for payment and their entitlement to monetary relief are substantive rights. Landgraf, *supra*. Thus, the setoff statute should not have been retroactively applied to change Mr. Clavette's original award of benefits in this case. It was a violation of Mr. Clavette's constitutional right to due process to do so.

Other jurisdictions have held that similar setoff provisions may not be applied retroactively. In Horton v. Fleming Co., 590 P.2d 594 (Kan.App. 1979), claimants who were survivors of a worker who had been fatally injured in the course of his employment were awarded

dependency benefits. However, the benefits were reduced by a setoff equal to one-half of any social security benefits received. The setoff statute had been repealed after the date of their award. The claimants argued that the repeal should be applied retroactively so that payments due after the repeal would no longer be subject to the setoff. The Kansas Court of Appeals held that the repeal was a substantive, not a procedural change and thus could not be applied retroactively so as to affect the amount of awards made before the repeal. The Court held that the amount of compensation payable to a workers' compensation claimant was a matter of substance, not procedure. See also Brown v. Goodyear Tire and Rubber Co., 599 P.2d 1031 (Kan. App. 1979).

Other jurisdictions have similarly held that the amount of compensation payable to a workers' compensation claimant is a matter of substance rather than procedure. Cooper v. Wicomico County, 366 A.2d 55 (Md.

1976); Aetna Casualty and Surety Co. v. Industrial Accident Commission, 174 P.2d 41, 44-49 (Cal. App. 1946), *aff'd.* 182 P.2d 159 (1947); Riggs v. Lehigh, 131 N.E. 231 (Ind. 1921).

Evidence that the Maine Legislature views statutory setoffs as affecting substantive rights is also found in Maine's workers' compensation law. For many years, the Maine Workers' Compensation Act has allowed setoffs of certain benefits such as pensions, social security compensation, unemployment compensation, group health benefits, and employee disability benefit plans. See former 39 M.R.S.A. §§ 62-A, 62-B, 111-A. Under the 1992 Act, Title 39-A, the Maine Legislature amended these coordination of benefits sections by adding certain setoffs and declining to apply them to scheduled benefits. Yet, under the 1992 Act, the provision allowing certain setoffs and coordination of benefits was specifically excluded from the retroactive application of the new Title 39-A. The

Legislature stated that "any changes as to benefit levels will apply only to injuries on or after January 1, 1993. The benefit levels in effect as of the date of injury will apply for all injuries prior to January 1, 1993." It went on to state that these issues would be resolved under "old substantive law."

Thus, the Legislature has recognized that setoffs which directly affect employees' level of benefits and an employer's obligation for payment of benefits as a substantive legal change, not a procedural one entitled to retroactivity. The Hearing Officer here erred in ruling otherwise. To find that such substantive changes in setoff can be applied retroactively only to veterans and no other injured workers is discriminatory. It denies veterans equal protection under law in violation of their constitutional Fourteenth Amendment rights.

The original Hearing Officer in this case also erred in refusing to look at the legislative history behind the

statute providing a setoff of veterans' benefits. There is evidence in the statutory history that the Legislature intended the statutory changes to have only prospective, not retrospective, application. The Legislature indicated in transition language that when the new statute became law, it would have no effect on the contracts or terms of employees or officers employed or appointed under the provisions of the prior statute. A logical extension of that would be to include employees who were injured and receiving workers' compensation benefits pursuant to the provisions of the former Act as opposed to the amendments that were made three (3) years later.

Since the state action before this Court involves Maine's state workers' compensation regulations, the state action in question must bear a rational relationship to a legitimate end of government in order to meet muster under the petitioner's right to Equal Protection of the laws and Substantive Due Process. While it is a legitimate end

of state government to prevent a veteran from collecting benefits from both the Veterans' Administration and Maine's Workers' Compensation Commission for the same work injury, state action fails the rationality test when it exceeds its jurisdictional authority in violation of federal law to offset state workers' compensation benefits for unrelated, service-connected disability for injuries the Veterans' Administration has determined to arise from sources other than a work injury.

Ignoring federal law and extending a state's authority to offset service-connected injuries and disabilities which are unrelated to a work injury discriminates against veterans in that it prevents them from ever legitimately claiming both state workers' compensation benefits and veterans' disability benefits for two separate and unrelated injuries and disabilities. The claimant who is not a veteran faces no such hurdle under Maine law since the Maine Workers' Compensation Act

specifically prohibits the offset of workers' compensation benefits for non-work-related injuries. See 39-A M.R.S.A. §201(5). That statute reads: *"If an employee suffers a non-work-related injury or disease that is not causally connected to a previous compensable injury, the subsequent non-work-related injury or disease is not compensable under this Act."*

Thus, under the Maine Workers' Compensation Statute, veterans such as Mr. Clavette who have sustained pre-existing service-connected injuries and disability are subject to an offset from their unrelated state workers' compensation injuries whereas civilian claimants who recover benefits or damages for non-work-related injuries are not subject to such offset. The exercise of state action in this respect, especially under the circumstances of Mr. Clavette's claim where the state action directly benefitted the State of Maine by reducing their responsibility for payment of workers' compensation benefits to him, is a violation of the Fourteenth Amendment's equal protection

and substantive due process clauses.

CONCLUSION

For these reasons, the Petitioner respectfully requests that his Petition for a Writ of *Certiorari* be granted and that a full consideration of these issues raised here be accorded.

Respectfully submitted this 22nd day of February, 2001.



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A1

JOSEPH G. CLAVETTE

VS.

MAINE NATIONAL GUARD
Self Insured

PETITION FOR AWARD OF COMPENSATION on account of an injury sustained on August 23, 1978 while on active duty with the Maine National Guard, filed with the Commission on February 26, 1980. George P. Limberis, Esq. for the employee; Steven Wright, Esq. for the employer.

I find that on August 23, 1978 petitioner was a member of the Maine National Guard and was participating in a camp of instruction engaged in drill and other duty under the command of a superior officer, when he sustained an injury. I find that while Mr. Clavette was lifting on a segment of a "bailey bridge" he injured his lower back.

I find that petitioner gave adequate notice to his

superiors in the Maine National Guard and further that the Maine National Guard had adequate knowledge of petitioner's injury within the time limits set forth in Sections 63 and 64 of the Act.

I find that petitioner sustained immediate low back pain but continued, after a short period of light duty, to complete his duties

both during the summer encampment and during the regularly scheduled drills of the Maine National Guard during the next several months following the injury. Petitioner resumed his studies in the fall of 1978 at the University of Maine. However during the spring semester of 1970 petitioner's back difficulties made it difficult for him to sit during long periods and he terminated his studies.

I find that petitioner's back condition persisted and during August of 1979 he came under the treatment of a local chiropractor. Chiropractic treatment was not a

benefit and petitioner began, in September of 1979, to treat with Dr. Perotta, a Bangor osteopathic physician.

I find that by October 22, 1979 petitioner had made marked improvement. In the early winter or late fall of 1979 petitioner began to play on a hockey team. This effort was not successful since petitioner's back problem once again began to give him problems. Fortunately, for the petitioner, one of his fellow hockey players was Dr. John Adams, a Bangor orthopedic physician.

On November 6, 1980 Dr. Adams examined petitioner and found that there was marked limitation on straight leg raising testing. This indicated to the doctor that there was a disk problem in petitioner's low back.

I find that petitioner was admitted for a myelogram which demonstrated severe pressure on the nerve root at L5-S1 on the right. The next day petitioner underwent surgery for the removal of a disk fragment at L5-S1 on the right.

I find that Dr. Adams continued to see petitioner and follow-up to the surgery. By March 17, of 1980 there was no residual sciatica, there was a normal neurological exam but there was some residual back pain.

I find that by July 24 of 1980 the neurological exam was still negative, petitioner had regained good range of motion in his back but he still had some residual ache in his back and right thigh.

As of this date Dr. Adams was of the opinion, and I so find, that petitioner had a capacity for light physical activities but was limited from engaging in any heavy lifting or bending or twisting.

I find that following this date petitioner engaged in a good faith work search. I find that based upon his description of job contacts a pattern of employer responses existed which demonstrates to me that either there was no stable market for an employee with his limitations or that employers would not hire him because of his back

condition.

By October 6 of 1980 petitioner had made further improvement. He was capable of somewhat heavier physical activities but still was limited to sedentary type work without any heavy lifting. His back was still bothering him so that he requested, and obtained from Dr. Adams, permission to limit his class load at the University of Maine because the long sitting in classes tended to bother his back.

I find that petitioner's ruptured disk and the resulting pressure on the L5-S1 nerve root was a direct result of the injury sustained on August 23, 1978 while working at the National Guard summer encampment.

The parties have stipulated that petitioner's average weekly wage in his regular employment was $225 per week at the time of the injury.

I find that petitioner was partially disabled, to the degree of 80%, from the date of his injury through October

22, 1979. I find that he was 60% partially incapacitated from that date through November 6, 1979. I find that petitioner was totally incapacitated from November 6, 1979 through July 24, 1980. Subsequent to that date, although petitioner had regained a partial work capacity, I find that he is entitled to continue receiving benefits for total incapacity because there is no work available to him either because there is none on the job market or because employers will not hire him with his limited condition.

It is hereby ordered and decreed that the employer pay petitioner at the rate of $120 a week for the period from August 23, 1978 through June 30, 1979, at the rate of $130.47 per week for the period from July 1, 1979 through October 21, 1979; at the rate of $97.85 per week for the period from October 22, 1979 through November 6, 1979; at the rate of $163.09 per week from November 7, 1979 through June 30, 1980; and at the rate of $176.90 per week from July 1, 1980 to the date of this decree and continuing

subject to adjustments required by the Act, excluding from the aforesaid any period during which petitioner was paid under 57-A M.R.S.A. Section 936 while he remained in a federal pay status.

So Ordered.

Augusta, Maine

WORKERS COMPENSATION

COMMISSION

January 30, 1981

s\Ronald H Russell
COMMISSIONER

ml

STATE OF MAINE
WORKERS' COMPENSATION BOARD
ONE VAUGHN PLACE
10 WASHBURN AVE., SUITE 110
CARIBOU, MAINE 04736

DATE MAILED: NOV 0 1 1996

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WCB: 78048017 DOI: 082378

****

JOSEPH CLAVETTE
(Employee)

v.

STATE OF MAINE (NATIONAL GUARD)
(Employer)

and

SELF INSURED
(Insurer)

A hearing was held in Caribou, Maine, on 16 October 1995 at the request of the parties. The record closed on 22 October 1996. Presently before the Board are a *PETITION TO FIX THE AMOUNT TO BE ALLOWED* and a *PETITION FOR SET OFF*. The employee was present and represented by legal counsel, Attorney Michael Dostie. Appearing on behalf of the employer/insurer was Attorney William Smith. The employee is seeking payment of $4,560.60 in mileage expenses; $2,520 for a driver; $578.20 for lodging expenses; $1,003.24 for meals; $3,725 for medical treatment; $8 for fax expenses and $968.75 in deposition expenses, for a total of $13,363.79. The employer is seeking a set off against compensation already paid and being paid to the employee in the form of VA benefits received for the employee's back injury.

There is a lengthy history in this case

demonstrating an inability resolve payment for medical expenses short of litigation. The most recent decree dated 3 June 1993 addressed some of the same issues that are presented by the pending petition. The employee began treating with Dr. Grumpelt, a psychologist, in 1985. According to Dr. Grumpelt's deposition testimony in August 1995, the employee's condition has deteriorated significantly since the last time he testified in 1992. The primary problem with payment of Dr. Grumpelt's bills has always been the degree to which the treatment is related to the employee's work injury and its sequelae and the degree to which it deals with other non work-related psychosocial problems. The June 1993 decree recites that Dr. Grumpelt testified in 1992 that some of the counseling involved matters relating to the employee's personal life and were not directly related to the injury. Although Dr.

Grumpelt did testify that it was easy to make a case for at least part of each session to relate to the employee's back injury, it seemed clear that he felt that many of his psychosocial issues actually flowed from the work injury. Despite the employee's troubled childhood and significant stresses while serving in the military, Dr. Grumpelt felt that but for the injury, there was a good probability that the employee would not have had delusions about his wife's fidelity, would not have been depressed and irritable and had problems with his temper. Dr. Grumpelt felt there was a good possibility that the employee could have been a better father and a better mate.

Based on the fact that the work injury was only partially responsible for the treatment, the Hearing Officer reduced the amount requested both for the treatment itself along with the concomitant

expenses such as mileage, lodging, etc.

Dr. Grumpelt testified in 1995, consistent with his earlier opinion, that it would be very unlikely that the employee would be having problems to the extent that he had over the last ten years were it not for the injury. This is based on the fact that prior to the injury the employee was doing well financially. He was active in his community and he had a relatively good home life. After the injury and the pain the employee experienced, his home life deteriorated, his sense of pride and self significantly deteriorated, his sexual life deteriorated and his financial condition, to some degree, deteriorated. Dr. Grumpelt went on to say that people do not function in isolation with one single cause for each bit of behavior in their life. There are multiple factors, including genetic, physiological and historical events that intertwine to influence a

person's life forever.

While I agree in principle with much of what Dr. Grumpelt had to say, nonetheless, I feel as time goes on the connection between the work injury and some of the other issues becomes more attenuated. For example, the employee's adult children's lifestyle choices and his concerns about his own mortality are not related, even indirectly, to the work injury. Accordingly, the request for treatment is granted in part and the insurer ordered to pay Dr. Grumpelt $1,300.

Another area of ongoing contention are the meals, lodging and "chauffeur" related expenses. The employer suggests that no doctor has ever told the employee that he cannot drive and, therefore, the driver is not necessary.

In the alternative, the employer suggests that the statement relating to trips made by Mr. Beaulieu

is suspect.

The fact that the employee puts 32,000 non medical miles on his vehicle annually does not mean that he is physically capable of driving from his home in Madawaska to Windham. Whether one assigns a physical or psychological explanation for the employee's limitations, they are significant. I accept that the employee is not of driving the distances involved with treatment in Calais, Augusta and the Portland area. I find that the employee is capable of driving to Caribou. However, the amount requested seems excessive. I order for those trips found to be reimbursable that the driver be paid at the rate of $5.00 per hour.

Meals and lodging expenses also present difficulties. I have found the State of Maine Travel and Reimbursement Policy to be a useful guide when trying steer a middle course between

insurance adjusters and employees. I take this opportunity to note that the employee seems to have been trying to take advantage of the situation in some cases. For example, the employee had an appointment on 5 August 1992 so he traveled down on 4 August 1992. However, the day after the appointment, he still seeks additional expenses (meals) which I find to be unnecessary.

In addition to treatment with Dr. Grumpelt, at the behest of his attorney, the employee attempted to find a counselor closer to his residence. The bills are for treatment from August 1993 through January 1994. They total $325. Some of the charges represent appointments that the employee did not keep. It is not reasonable to expect the insurer to pay for these visits. The employer suggests that the employee has not met his burden to demonstrate that he participated in any meaningful way such that

services can be considered reasonable and necessary.

Dr. Grumpelt has discussed the idea of the employee transfering and care to a local mental health professional in the past and advised that he did not think it was in the employee's best interests. As one of the reasons for this he indicated that the employee had difficulty establishing a trusting relationship with others and he and the employee enjoyed an unusually close relationship.

Dr. Grumpelt's July 1994 note reflects that the employee reported trying another therapist but found it less satisfying and difficult to establish a trusting relationship. Keeping in mind that this is being filtered through Dr. Grumpelt, it does seem to indicate a less than wholehearted commitment to the process. I order that $200 be paid.

Some of the medical treatments at issue stem from unrelated health problems. Chief among these

is treatment for the employee's heart condition. Dr. Grumpelt has added fuel to the fire by writing to counsel for the employee that, in his best judgment, the employee's heart condition has been influenced by his perceptions about fairness issues surrounding his Workers' Compensation case. This, despite the fact that he had reviewed no medical records and indeed had no information regarding the problem other than that provided by the employee. Ultimately, Dr. Grumpelt admitted during his deposition that he was not a medical doctor and was not trying to ascertain the nature of the employee's heart attack.

On the other hand, the employee's treating cardiologist indicated that there was a *possibility* that stress might be involved in the generation of a coronary syndrome, but in no way would he characterize it as a probability. The request for faxed

medical records is also denied as it involved treatment at Houlton Regional Hospital for the employee's cardiac problems.

Likewise, the treatment associated with cessation of smoking while it might be beneficial to the employee's overall health, is not related to the 1978 work injury. The employee began smoking prior to the work injury and continued thereafter.

The employee had previously tried aquatherapy with, at least according to Dr. Grumpelt's notes, little success. Although Dr. Mainen seems to suggest it was appropriate in lieu of taking medications, the employee was in fact taking medications during this period. Given that the employee's level of functionality and, apparently his level of discomfort, have remained constant. I find that the limited relief offered does not justify the expense. This request is also denied.

Finally, the employee is seeking payment for $968.75 in expenses associated with the 1995 deposition of Dr. Grumpelt. I agree with counsel for the employer that this is a litigation expense properly includable in a request for fees. It is not medical treatment for the employee.

In order to avoid unnecessary confusion, I have taken the liberty of annotating Employee Exhibit #3 to indicate which expense are compensable, either in whole or in part.

It is the state's position that they are entitled to set off the employee's VA benefits effective the date the petition was filed on 21 April 1994. At the time of the employee's injury in August 1978, he was receiving a 10% service connected disability for a psychophysiological reaction. After the injury the VA disability was raised 30% to reflect an additional 20% disability for his back. In 1991 the employee's

back disability was increased to 40% leaving him with a total of 50% disability. Although the employee testified in October 1995 that his current level of disability was 60%, it was not entirely clear that he either understood the question or what the basis for the change was.

At the time of the employee's injury, the law did not provide for a set off of any veteran's benefits from Workers' Compensation benefits that the guardsman might receive. In 1978 37-A M.R.S.A. §938 provided as follows:

> Any member of the National Guard or other authorized state military or naval forces who shall, when on duty or assembled therefore, the case of riot, tumult, breach of peace, insurrection or invasion, or whenever called into active service of the State

by order of the Governor, or called in aid of the civil authorities, or when participating by order of the Governor by any encampment, maneuvers or field instructions or any part of the regular army or air force at or near any military post or camp or lake or seacoast defenses of the United States, or when participating by order of the Governor in practice marches or camps of instruction, or when assembled in any regular or special drill, or other duty under the command of a superior officer, receive any injury or incur or contract any disability or disease by reason of such duty or assembly, or who shall without willful negligence on his part

receive any wound, injury or disease incident thereto while performing any lawfully ordered duty which shall incapacitate him for his usual business or occupation, shall receive compensation according to Title 39, and any amendment thereto, as an employee of this state. The average weekly wage in such cases shall be taken to be the earning capacity of the injured in the occupation which he is regularly engaged, and in case of death, his dependents, if any, shall be entitled to compensation as provided in said Title 39. Any member of the National Guard or other authorized state, military or naval forces who suffers injury or contracts disease, not

> the result of his own misconduct, while in attendance of a camp of instruction authorized by the national military establishment and ordered by the Governor, shall receive the pay provided in Section 936, while he remains in federal pay status in lieu of his compensation provided for in this section.

There is no dispute that the employee, at the time of his injury, was not in attendance at a camp of instruction authorized by the national military establishment and ordered by the Governor. Thus, he was not entitled to receive pay as provided in Section 936. The employee has not been on active duty since the date of injury so there have been no subsequent periods where the federal pay status contained in Section 936 has been applicable.

In 1981 Section 938 was amended by adding the following language:

> "For purposes of Title 39, Section 62, federal pay and benefits received by the member as a result of any such wound, injury or disease shall be considered to be derived from the employer and will constitute a set off to compensation derived as a result of this Section."

The amendment became effective on 13 July 1982. By the time the amendment became effective, the employee had received in excess of three years of benefits.

As acknowledged by the Law Court in Norton v. CP Blouin, Inc., 511 A.2d 1056 (Me. 1986) their opinions written over a period of years contain divergent analytic approaches on the question of

retroactive application of statutes. As I understand it, two questions need to be asked: First, did the Legislature intend that the 1981 amendment to Section 938 apply where the onset of incapacity occurred prior to the effective date of the statute? A subset of this question is whether the proposed application is in fact retroactive. Second, whether such an interpretation violates the employee's constitutional right to due process?

The employee has cited Reggep v. Lumber Shoe Products Company, 241 A.2d 802 (Me. 1968) as standing for the proposition that a worker's right to Workers' Compensation benefits becomes vested on the date of injury and cannot be increased or diminished by legislation enacted subsequent to that date. However, this appears to have been overruled, at least implicitly, by Tompkins v. Wade and Searway, 612 A.2d 874 (Me. 1992). In Tompkins the

Court observed that the notion of a vested right to certain level of benefits is necessarily reliant on viewing Workers' Compensation Laws as contractual in nature, a view which they had previously rejected. The Court went on to say:

> To the extent, if any, that Tompkins might acquire on the date of injury a vested interest in the *right* to some level of benefits, the due process clause presents no barrier to the Legislature's retroactive adjustment to the particular *remedy* available in exercise of that right (citation omitted). We thus agree with the Michigan Supreme Court that the due process clause creates no vested rights "in the amount of liability established at the time of the injury". Tompkins at

878.

It does not follow, however, that because the Legislature possessed the power to enact a Statute which retroactively affects benefits that it did so in the passage of Section 938. The language of the amendment is general and makes no reference to causes of action which have already accrued. Unlike the 1992 Act, P.L. 1991, ch 885, Section A-10, there is no express savings clause expressly exempting statutory sections from its operation.

Absent such express commands or convincing limitations, the provision cannot be deemed to be intended to be retroactive. The general rule of statutory construction is that statutes will be considered to have prospective operation only unless Legislative intent to the contrary is clearly expressed. This requires the Legislature to express its intention to apply the statute retroactively in strong, clear and

imperative language. Terry v. St. Regis Paper Company, 459 A.2d 1106 (Me. 1983).

The Court will only imply a retroactive intent when the statute would be inoperative other than retrospectively. The language of Section 938 itself contains no express indication of Legislative intent regarding possible retroactive application, nor is such expression necessarily implied in the amendment as it is equally operative whether applied prospectively or retroactively.

Following the rationale advanced by Terry the conclusion seems inescapable that because the 1981 amendment is unambiguous on its face and carries no necessary implication of retroactive application, it is not necessary to look behind the statutory language to the Legislative history. See Concord General Mutual Ins. Co. v. Patrons Oxford Mutual Insurance Company, 411 A.2d 1017 (Me.

1980).

However, the rule of statutory construction disfavoring retroactive application does not come into play when the enactment changes only procedure governing litigation of claims, including even those already in existence when the Legislation takes effect. To apply a new statute to only the procedure to be followed in future litigation, even on existing claims is not seen as a retroactive application of the statute. Michaud v. Northern Maine Medical Center, 436 A.2d 398 (Me. 1991).

This statement still seems to be valid given the Law Court's language in Riley v. Bath Iron Works, 639 A.2d 628 (Me. 1994). In Riley the Court said "[c]ontrary to the employer's interpretation, *Demello* does not disturb the judicially created presumption that, absent any pending action or proceeding and absent any legislative statement to

the contrary, the Legislature intends that procedural changes apply to pre-existing inchoate interests and that substantive changes do not." Riley at 628.

The issue then becomes is this a substantive or procedural change. The Law Court has framed the question this way, "[i]f the statute effects a substantive change, that is, if it determines the legal significance of operative events occurring prior to its effective date by impairing rights by creating liabilities, the Statute will govern matters arising before its effective date only if legislative intent is clearly expressed or necessarily implied." Norton v. C.P. Blouin, Inc., 511 A.2d 1056 (Me. 1986).

The employer suggests that the amendment to Section 938 affected only the remedy and the state's potential liability. It did not affect the right to compensation, only his ability to have a double

recovery derived from the employer. I agree. To apply Section 938 as suggested by the employer, does not alter the legal significance of acts or events which occurred prior to its effective date and it is, therefore, more accurately more denominated as a procedural rather than a substantive change. The *PETITION FOR SET OFF* is granted. Because the Act makes no provision for the recovery of overpayment under these circumstances, the relief granted is prospective in nature only.

So Ordered.

Within 5 days after issuing this decision, the hearing officer may request that the full Workers' Compensation Board review the decision. See 39-A M.R.S.A. Section 320.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the Clerk of the Law Court within 20

days of receipt of this decision, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. See 39-A M.R.S.A. Section 322.

The insurer/employer is reminded to file the appropriate forms pursuant to Rule 8.12 where applicable.

Caribou, Maine

Dated: 31 October 1996

Workers' Compensation Board

s\DA Barnard
Deborah A. Barnard
Hearing Officer

STATE OF MAINE
WORKERS' COMPENSATION BOARD
ONE VAUGHN PLACE
10 WASHBURN AVE., SUITE 110
CARIBOU, MAINE 04736

DATE MAILED: FEB 13 1997

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JOSEPH CLAVETTE
(Employee)

v.

STATE OF MAINE (NATIONAL GUARD)
(Employer)

and

SELF INSURED
(Insurer)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The summary decision in this matter was issued on October 31, 1996. In response to the employee's Motion for Findings of Fact and Conclusions of Law, I find as follows:

The initial Board decision contains separate findings of fact and conclusions of law which provide an adequate foundation for appellate review. No further or more detailed findings are necessary in the circumstances of this case. See Parent v. Great Northern Paper Company, 424 A.2d 1099, 1100-101 (Me. 1981); Leo v. Great American Hoist & Derrick Company, 438 A.2d 917, 921 and 926-927 (Me. 1981); and Coty V. Town of Millinocket, 444 A.2d 355, 357-369 (Me. 1982).

WHEREFORE, the Board decision of October 31, 1996 stands unaltered.

So Ordered.

Within 5 days after issuing this decision, the hearing officer may request that the full Workers' Compensation Board review the decision. See 39-A M.R.S.A. §320.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the clerk of the Law Court within 20 days of receipt of this decision, and by filing a petition seeking appellate review with the Law Court within 20 days thereafter. See 39-A M.R.S.A. §322.

The insurer/employer is reminded to file the appropriate forms pursuant to Rule 8.12 where applicable.

Caribou, Maine

Dated: February 12, 1997

WORKERS' COMPENSATION BOARD

s\Jonathan W. Sprague
Jonathan W. Sprague
Hearing Officer

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court Docket No. WCB-97-97

JOSEPH CLAVETTE	)
	)
V.	)ORDER
	)DENYING
STATE OF MAINE, DEFENSES & VETERANS SERVICES	)PETITION
	)

Upon consideration by the Justices of this Court, the petition for appellate review of the decision of the Hearing Officer of the Workers' Compensation Board in this matter is denied. It is ORDERED that the employer pay to the employee an allowance for counsel fees and expenses in the amount of $75.00.

Dated: April 2, 1998

For the Court

s\Daniel E. Wathen
Chief Justice

Department of Veterans Affairs

Date of Rating: October 13, 1995

RATING DECISION

Name of Veteran: J G Clavette

Social Security Number: 049-44-0058

VA File Number: 26 555 439

ISSUE:

1. Evaluation of protruding disc lumbosacral spine currently evaluated as 60 percent disabling.

2. Evaluation of nervous condition currently evaluated as 10 percent disabling.

3. Entitlement to individual unemployability.

4. Eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35.

EVIDENCE:

VA examination dated 8-24-95 and 8-29-95.

Social work summary report.

VA Form 21-8940.

Report from Dr. Grumpelt.

Hospital report from Grand Falls General Hospital.

DECISION:

1. Evaluation of protruding disc lumbosacral spine, which is currently 60 percent disabling, is continued.

2. Evaluation of nervous condition, which is currently 10 percent disabling, is increased to 70 percent effective March 29, 1991.

3. Entitlement to individual unemployability is granted effective March 29, 1991.

4. Eligibility to Dependents' Educational Assistance is not established.

REASONS AND BASES:

1. The evaluation of protruding disc lumbosacral spine is continued as 60 percent disabling. An evaluation of 60 percent is granted whenever there is intervertebral disc syndrome with persistent symptoms compatible with sciatic neuropathy,

characteristic pain and demonstrable muscle spasm, absent ankle jerk, or other neurological findings appropriate to site of diseased disc and little intermittent relief.

Examination shows a chronic severe low back condition. The veteran also has absent right ankle jerk.

2. The evaluation of nervous condition is increased to 70 percent disabling effective March 29, 1991. An evaluation of 70 percent is assigned whenever there is evidence of severe inability to establish and maintain effective or favorable relationships with people. The psychoneurotic symptoms are of such severity and persistence that there is severe impairment in the ability to obtain or retain employment. A higher evaluation of 100 percent is not warranted unless evidence demonstrates that the attitudes of all contacts except the most intimate are

so adversely affected as to result in virtual isolation in the community with inability to obtain or retain employment. Totally incapacitating psychoneurotic symptoms such as fantasy, confusion, panic, and explosions of aggressive energy with disturbed thought or behavioral processes border on gross repudiation of reality resulting in profound retreat from mature behavior. Since this disability may be subject to improvement, the assigned evaluation is not considered permanent and is subject to a future review examination.

Examination shows a severe condition with a global assessment functioning of 31 to 40.

3. Entitlement to individual unemployability is granted because the claimant is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

4. Eligibility to Dependents' Educational Assistance

is derived from a veteran who was discharged under other than dishonorable conditions and has a permanent and total service-connected disability; or a permanent and total disability was in existence at the time of death; or the veteran died as a result of a service-connected disability. Eligibility to Dependents' Educational Assistance is denied as the evidence does not show the veteran currently has a total service-connected disability, permanent in nature.

Department of Veterans Affairs

DATE OF RATING: October 16, 1995

RATING

CODESHEET

JURISDICTION: BVA remand received 4-22-95

1. SC

9511 MAJOR DEPRESSION FORMERLY DIAGNOSED AS PSYCHO PHYSIOLOGICAL REACTION MANIFESTED BY ANGIONEUROTIC EDEMA

10% from 4-15-71

70% from 03-29-91 (VE INC)

5293 PROTRUDING DISC LUMBOSACRAL SPINE

20% from 8-26-78

60% from 03-29-91 (PTE INC)

6304 MALARIA

0% from 4-15-72 (VE INC)

8. N.S.C. VE

5203 NON UNION FRACTURE CLAVICLE RIGHT SHOULDER

6512 SINUS CONDITION

7005 CORONARY ARTERY DISEASE

7305 PEPTIC ULCER

7336 HEMORRHOIDS

COMB: SC SC 20% from 8-26-78

90% from 03-29-91

18A. Individual Unemployability from 03-29-91

Basic eligibility under 38 U.S.C. Chapter 35 is not established.

s/S. Karczewski
S KARCZEWSKI
RATING SPECIALIST

RATING DECISION

DEPARTMENT OF VETERANS AFFAIRS TOGUS MEDICAL AND REGIONAL OFFICE CENTER

NAME OF VETERAN: JOSEPH G. CLAVETTE

VA FILE NUMBER: 26 555 439

SOCIAL SECURITY NR: 049-44-0058

09/12/96

ISSUE:

1. Evaluation of major depression formerly diagnosed as psycho physiological reaction manifested by angioneurotic edema currently evaluated as 70 percent disabling.

2. Evaluation of protruding disc lumbosacral spine currently evaluated as 60 percent disabling.

3. Continued entitlement to individual unemployability.

4. Eligibility to Dependents' Educational Assistance under 38 U.S.C. chapter 35.

EVIDENCE:

VA examination dated 08-21-96

DECISION:

1. Evaluation of major depression formerly diagnosed as psycho physiological reaction manifested by angioneurotic edema, which is currently 70 percent disabling, is continued.

2. Evaluation of protruding disc lumbosacral spine, which is currently 60 percent disabling, is continued.

3. Continued entitlement to individual unemployability is shown.

4. Basic eligibility to Dependents' Educational Assistance is established from August 21, 1996.

REASONS AND BASES:

1. The evaluation of major depression formerly diagnosed as psycho physiological reaction manifested by angioneurotic edema is continued as

70 percent disabling. An evaluation of 70 percent is assigned whenever there is evidence of severe inability to establish and maintain effective or favorable relationships with people. The psychoneurotic symptoms are of such severity and persistence that there is severe impairment in the ability to obtain or retain employment. A higher evaluation of 100 percent is not warranted unless evidence demonstrates that the attitudes of all contacts except the most intimate are so adversely affected as to result in virtual isolation in the community; totally incapacitating psychoneurotic symptoms such as fantasy, confusion, panic, and explosions of aggressive energy with disturbed thought or behavioral processes border on gross repudiation of reality resulting in profound retreat from mature behavior.

VA examination dated 08-21-96 shows veteran's

mood is very depressed, his hands shake, and his palms sweat. He has difficulty with his associative processes. His cognitive functions would be described as impaired with decreased concentration. His affect is blunted and he had not delusions or hallucinations, but he made poor eye contact. He denies current suicidal, paranoid, or homicidal ideation. He has limited insight with an average IQ and fair judgment. He reports poor sleep and crying spells. His speech is quiet but rambling. He has a severely impaired industrial and social capacity. His current GAF is about 40.

2. The evaluation of protruding disc lumbosacral spine is continued as 60 percent disabling. An evaluation of 60 percent is granted whenever there is intervertebral disc syndrome with persistent symptoms compatible with sciatic neuropathy, characteristic pain and demonstrable muscle spasm,

absent ankle jerk, or other neurological findings appropriate to site of diseased disc and little intermittent relief.

VA examination dated 08-21-96 shows veteran continues to complain of chronic low back pain. He has a back brace, uses a TENS unit, and uses heat as well as medication. Examination shows a chronic severe low back condition and also a right ankle jerk. The chronic low back pain is secondary to the lumbar degenerative disk disease and degenerative disk disease of the lumbar spine.

3. Entitlement to individual unemployability is continued because the claimant is unable to secure or follow a substantially gainful occupation as a result of service-connected disabilities.

4. Eligibility to Dependents' Educational Assistance is derived from a veteran who was discharged under other than dishonorable conditions and has a

permanent and total service-connected disability; or a permanent and total disability was in existence at the time of death; or the veteran died as a result of a service-connected disability. Basic eligibility to Dependents' Educational Assistance is granted as the evidence shows the veteran currently has a total service-connected disability, permanent in nature.

JURISDICTION: New claim received 07-23-96

Basic eligibility under 38 U.S.C. Chapter 35 is established from 08-21-96.

s/D. St. Pierre
D. ST.PIERRE, RATING SPECIALIST

STATE OF MAINE
WORKERS' COMPENSATION BOARD
BANGOR STATE OFFICE COMPLEX
106 HOGAN ROAD
BANGOR, MAINE 04401
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Mail Date: September 29, 1999

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Bangor, ME 04402

Re: WCB File No.: 78-048017; D/I: 8/25/78

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Within five days after issuing this decision, the hearing officer may request that the full Workers' Compensation Board review the decision. See 39-A M.R.S.A. §320.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the Clerk of the Law Court within 20 days of receipt of this decision, and then filing a petition seeking appellate review with the Law Court within

20 days thereafter. See 39-A M.R.S.A. §322.

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JOSEPH CLAVETTE
(Employee)

V.

STATE OF MAINE
DEPARTMENT OF DEFENSE & VETERANS
SERVICES (Self-insured Employer)

****

Currently before the Board is a PETITION FOR ORDER OF PAYMENT filed by the employer (sic) on January 27, 1999 based on an August 23, 1978 injury.

As evidence, the Board has considered the testimony of the employee as well as the following documentary evidence: Employee's Exhibit 1, a Maine workers' compensation payment history; Employee's Exhibit 2, a Certificate Authorizing the

Release of Benefit Information; Employee's Exhibit 3, the Department of Veterans' Affairs Medical Regional Office Center decision; Employee's Exhibit 4, a booklet explaining medical benefits for veterans and dependents; Employer's Exhibit 1, the Veterans' Administration decision dated July 19, 1991; Employer's Exhibit 2, a Certificate Authorizing Release of Benefit Information; and Employer's Exhibit 3, an overpayment calculation. In addition, the Board has considered the following evidence presented by the parties after the hearing sua sponte: additional ratings decisions from the Veterans' Administration and Dr. Randall Grumpelt's report of August 26, 1999 as well as the deposition of Dr. Grumpelt taken on July 28, 1996; the deposition of Dr. Grumpelt taken on April 5, 1991; the deposition of Dr. Grumpelt taken on June 8, 1992; the deposition of Dr. Grumpelt taken on August 8, 1995; pages 10

through 11 and 25 through 30 of Joseph Clavette's testimony taken on July 9, 1992; and a medical records index and attached medical reports consisting mainly of Dr. Grumpelt's reports and reports from the Aroostook Mental Medical Center (sic), which the Board obviously takes to mean the Aroostook Mental Health Center. In addition, the Board administrative notice of all prior decisions contained in its file including specifically the decision from former hearing officer dated October 31, 1996.

At issue in this case is the amount of the offset that the State of Maine Workers' Compensation Department is allowed to take against the employee's Veterans' Administration pension. The employee receives for his V.A. benefits a pension in the amount of $1,989.00 a month. His argument is that only 60 percent of this is for his back. The

remainder is for his psychological injuries which he argues currently are not related to his work injury and therefore the State should not be allowed to take an offset against them. As a basis for this, the employee cites the former hearing officer's decision dated October 31, 1996. In that decision, the hearing officer indicates that she feels that:

> "As time goes on, the connection between the work injury and some of the other issues becomes attenuated. For example, the employee's adult children's lifestyle choices and concerns about his own mortality are not related, even indirectly, to the work injury. Accordingly, the request for treatment is granted in part and the insurer ordered to pay Dr. Grumpelt $1,300."

See page 3 of October 31, 1996 decision. The total amount of the bills was $3,725.00, but only part of this was Dr. Grumpelt's bill. The employee had other medical expenses.

The employee's argument is because of this, his psychological condition is not related to his work injury and, therefore, the State of Maine is not entitled to take an offset for the 70 percent related V.A. benefits. Balanced against this is evidence offered by the employer showing that since 1986, the employee's treating psychologist, Dr. Grumpelt, was of the opinion that the employee's condition was in significant part related to his work injury. In 1986, the doctor stated:

> "Joe had begun suffering a notable emotional and/or mental illness, namely paranoia. At that time, I thought it post-traumatic stress

> disorder, and finally a dysthymic disorder. And I think each of these was related significantly to his accident in 1978. I cannot say that they were only related to that accident, but I think they were a precursor in his personality that also had an influence on the development of these symptoms."

Dr. Grumpelt's July 28, 1986 deposition at pages 8 and 9. Dr. Grumpelt was again questioned about the relationship between the employee's psychological problems and his work injury on June 17, 1991. He was asked the question

> "Since 1989 -- since January of 1989, has your psychotherapeutic treatment of Mr. Clavette, is that associated with his back injury, in you (sic) opinion, at

this point?

A. Absolutely. No question about it. I will have to say that Joe is a complicated person, and we do not just deal with his back when he comes in. He has a multiplicity of issues, however, the pain issue, the change in role and in status, the disruption of his family that in part was related to his change in role and status, and that continues to this day, are all related to the initial back injury. And I think that certainly we are continuing to work on it.

We do work on issues that are related to his childhood also. Joe, for instance, has had a very difficult childhood in which his father at times

was -- used punishment methods that would be kind of unheard of today and viewed today as cruel. His parents broke up when Joe was about 8, and Joe was quote sent to a farm when he was 12. Where he was, from Joe's point of view just used as a work horse. Joe basically left Canada when he was 15, and immigrated on his own to the states, because he was basically so unhappy.

And all of that provides the background for a man who with that kind of background would be likely to have some personality problems. At the same time prior to his injuries, he was relatively well and was making it."

Deposition of Dr. Grumpelt dated June 17, 1991 at pages 10 and 11.

Dr. Grumpelt's deposition was taken again on July 10, 1992, where he was asked the question:

> "Now, have any of these sessions that are listed on your bill of May 18, 1992, have any of those sessions been for anything other than treatment for the issues we've talked about here today, the back problems, the family problems, things of that nature? I guess my question is, do these all relate to his back injury, or are there some sessions which relate only to other peripheral issues?
>
> A. I think that it's easy to make a case for each session, in part, relating to his back injury.

Q. Has he ever expressed to you any problems that he's had with the workers' compensation system itself and the litigation problem?

A. Oh, yes, repeatedly."

At that point in time, Dr. Grumpelt indicated that much of what was troubling the employee from a psychological standpoint was work related, although he did have other significant problems in his personal life. The doctor even attributed the paranoia which the employee suffers from as being related to the work injury. Page 29 of Grumpelt's deposition transcript.

Reviewing Dr. Grumpelt's latest report sent to the Board on August 26, 1999, the doctor indicates that there are seven "salient etiological factors" in Mr. Clavette's condition, one of which was his back injury in 1978 and being unable to work and often in

considerable pain. The doctor further stated:

> "It is certainly also true that following Mr. Clavette's back injury in 1978 he was exposed to some intense stressors from family problems and loss of identity as a working man."

The doctor goes on to say that the employee had other significant problems and when combined with the work injury, they rendered the employee significantly psychologically ill.

It is clear to the undersigned that the employee's psychological problems related to the work injury are still playing a significant role in his overall psychological problems. The evidence in this case, some of which is cited above, is voluminous. This connection is not only proven by a preponderance of the evidence by the employer, but almost beyond a reasonable doubt. Since it is clear

that the State's payments to Mr. Clavette are related, at least in significant part, upon his psychological condition, the Petition for Order of Payment is denied and the State may continue to offset the total amount of the V.A. benefits.

PURSUANT TO BOARD RULE CHAPTER 12, SEC. 19, ALL EVIDENCE AND TRANSCRIPTS IN THIS MATTER WILL BE DESTROYED IN 60 DAYS UNLESS (1) THIS OFFICE OF THE WORKERS' COMPENSATION BOARD RECEIVES WRITTEN NOTIFICATION THAT ONE OR MORE PARTIES WISH TO HAVE THEIR EXHIBITS RETURNED TO THEM, OR (2) A PETITION FOR APPELLATE REVIEW IS FILED. THE 60 DAYS WILL NOT BEGIN TO RUN UNTIL ALL POST-DECREE MOTIONS HAVE BEEN DECIDED OR OTHERWISE DISPOSED OF.

So Ordered.

Dated: September 29, 1999

Bangor, Maine

WORKERS' COMPENSATION BOARD

s/Jonathan W. Sprague
JONATHAN W. SPRAGUE
HEARING OFFICER

STATE OF MAINE
WORKERS' COMPENSATION BOARD
BANGOR STATE OFFICE COMPLEX
106 HOGAN ROAD
BANGOR, MAINE 04401
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Mail Date: December 14, 1999

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Re: WCB File No.: 78-048017; D/I: 8/25/78

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Within five days after issuing this decision, the hearing officer may request that the full Workers' Compensation Board review the decision. See 39-A M.R.S.A. §320.

Any party in interest may request an appeal to the Maine Law Court by filing a copy of this decision with the Clerk of the Law Court within 20 days of receipt of this decision, and then filing a petition seeking appellate review with the Law Court within

20 days thereafter. See 39-A M.R.S.A. §322.

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JOSEPH CLAVETTE
(Employee)

V.

STATE OF MAINE
DEPARTMENT OF DEFENSE & VETERANS
SERVICES (Self-insured Employer)

****

On October 18, 1999, the employer (sic) filed a MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW regarding the Board decree dated September 29, 1999. After a review of the initial decision, the Board finds that the decision contains separate findings of fact and conclusions of law which are sufficient to provide an adequate foundation for appellate review. 39-A M.R.S.A. §318. It is further concluded that no further or more

detailed findings and conclusions are necessary in the circumstances of this case.

The Motion for Findings of Fact and Conclusions of Law is denied. The Board decree dated September 29, 1999 stands unaltered.

PURSUANT TO BOARD RULE CHAPTER 12, §19, ALL EVIDENCE AND TRANSCRIPTS IN THIS MATTER WILL BE DESTROYED IN 60 DAYS UNLESS (1) THIS OFFICE OF THE WORKERS' COMPENSATION BOARD RECEIVES WRITTEN NOTIFICATION THAT ONE OR MORE PARTIES WISH TO HAVE THEIR EXHIBITS RETURNED TO THEM, OR (2) A PETITION FOR APPELLATE REVIEW IS FILED. THE 60 DAYS WILL NOT BEGIN TO RUN UNTIL ALL POST-DECREE MOTIONS HAVE BEEN DECIDED OR OTHERWISE DISPOSED OF.

So Ordered.

Dated: December 14, 1999

Bangor, Maine

WORKERS' COMPENSATION BOARD

s/Jonathan W. Sprague
JONATHAN W. SPRAGUE
HEARING OFFICER

STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court Docket No. WCB-00-08

JOSEPH CLAVETTE	)	
	)	
v.	)	ORDER DENYING
STATE OF MAINE, NATIONAL GUARD	)	PETITION

Upon consideration by the Justices of this Court, the petition for appellate review of the decision of the Hearing Officer of the Workers' Compensation Board in this matter is denied. It is ORDERED that the employer pay to the employee an allowance for counsel fees and expenses in the amount of $75.00.

Dated: September 21, 2000

For the Court

s/Daniel E. Wathen
Chief Justice

UNITED STATES CONSTITUTION

ARTICLE VI

[2] This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES CONSTITUTION

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation. (Emphasis added.)

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.** (Emphasis added.)

37-B M.R.S.A. §186 (1988)

§186. Injuries sustained in connection with military duty

1. COMPENSATION AS STATE EMPLOYEE. A member of the state military forces receives compensation as a state employee according to the provisions of former Title 39, Title 39-A and this section.

. . .

F. For the purpose of former Title 39, section 62, all federal benefits received by the member as a result of an injury, disability or disease are considered to be derived from the employer and constitute a setoff to compensation awarded as a result of this section. A dollar-for-dollar setoff is authorized for all federal benefits to include continuation of pay under section 143, continuation of federal pay and allowances, incapacitation pay,

severance pay, disability retirement pay, Veterans' Administration disability payments and military and Veterans' Administration death benefits; and

G. Reporting under the early pay provisions of former Title 39 or Title 39-A, section 205 do not have to be initiated until a final decision is reached on the injured service member's entitlement to federal benefits or while military or veterans' disability benefits are received in lieu of compensation under former Title 39 or Title 39-A, whichever ceases first. Veterans' disability benefits provided in this subsection include state military duty pay received under section 143, federal continuation pay or incapacitation pay in lieu of benefits under former Title 39 or Title 39-A. The time provisions of former Title 39 or Title 39-A are effective upon notification to the service member that federal benefits are not authorized, or the gross

monetary federal benefits are determined to be less than the entitlements under former Title 39 or Title 39-A without taking into account the setoff prescribed in paragraph E.

37-A M.R.S.A. §938 (1971)

§938. Eligibility and amounts

Any member of the National Guard or other authorized state military or naval forces who shall, when on duty or assembled therefor, in case of riot, tumult, breach of the peace, insurrection or invasion, or whenever called into active service of the State by order of the Governor, or called in aid of the civil authorities, or when participating by order of the Governor in any encampment, maneuvers or field instruction of any part of the regular army or air force at or near any military post or camp or lake or seacoast defenses of the United States, or when participating by order of the Governor in practice marches or camps of instruction, or when assembled for any regular or special drill or other duty under the command of a superior officer, receive any injury, or incur or contract any disability or disease

by reason of such duty or assembly, or who shall without willful negligence on his part receive any wound, injury or disease incident thereto while performing any lawfully ordered duty which shall incapacitate him for his usual business or occupation, shall receive compensation according to Title 39, and any amendments thereto, as an employee of this State. The average weekly wage in such cases shall be taken to be the earning capacity of the injured in the occupation in which he is regularly engaged, and in case of death, his dependents, if any, shall be entitled to compensation as provided in said Title 39. Any member of the National Guard or other authorized state military or naval forces who suffers injury or contracts disease, not the result of his own misconduct, while in attendance at a camp of instruction authorized by the national military establishment and ordered by

the Governor, shall receive the pay provided in section 936, while he remains in a federal pay status in lieu of the compensation provided for in this section.

39-A M.R.S.A. §201(5)

§201. Entitlement to compensation and service generally

. . .

5. Subsequent nonwork injuries. If an employee suffers a nonwork-related injury or disease that is not causally connected to a previous compensable injury, the subsequent nonwork-related injury or disease is not compensable under this Act.

38 U.S.C.A. §511(a)

§511. Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subjection (a) does not apply to---

(1) matters subject to section 502 of this title;

(2) matters covered by sections

1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.